

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

DEANNA CUCCINELLO,)	
)	
Employee/Grievant,)	DOCKET No. 10-06-475
v.)	
)	DECISION AND ORDER
DEPARTMENT OF NATURAL RESOURCES)	
AND ENVIRONMENTAL CONTROL,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:45 a.m. on January 26, 2011 in the Delaware Room at the Public Archives Building, 102 Duke of York Street, Dover, DE 19901.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deanna Cuccinello
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Natural Resources and Environmental
Control

BRIEF SUMMARY OF THE EVIDENCE

The Board heard argument on the motion by the Department of Natural Resources and Environmental Control (DNREC) to dismiss the appeal. DNREC attached to its motion five exhibits: e-mail dated April 20, 2010 from Linda J. McCloskey to Deanna Cuccinello (Exh. A); Cuccinello's Step 1 grievance dated February 24, 2010 (Exh. B); Step Three Merit Grievance Decision dated May 27, 2010 (Exh. C); Cuccinello's appeal to the Board dated June 16, 2010 (Exh. D); and *Department of Correction v. Justice*, C.A. No. 06A-12-006 (RBY) (Del. Super., Aug. 23, 2007) (Exh. E).

The employee/grievant, Deanna Cuccinello (Cuccinello), testified on her own behalf and offered two exhibits into evidence: a time-line of her grievance; and a page from the Office of Management and Budget's website titled "Applicant Appeals."¹

At the close of Cuccinello's case, DNREC moved for involuntary dismissal because she had failed to state a claim under the Merit Rules for which the Board could grant relief as a matter of law.

FINDINGS OF FACT

On December 16, 2009, the Office of Management and Budget (OMB) posted a position for Engineer III at DNREC. Cuccinello applied for the promotion. On January 4, 2010, DNREC notified Cuccinello that she was qualified for the position. However, the next day DNREC notified Cuccinello that she was not qualified.

¹ Cuccinello's father, Milton Morozowich, sat with her at the hearing. The Board denied his request to help "guide" her through the presentation of her case. "[A] person who is not a member of the Delaware bar may not represent [a party] in grievance proceedings [before the Board]." *Att'y Gen. Op.* 93-IO31 (Oct. 6, 1993).

On January 14, 2010, Cuccinello filed a timely appeal to the Director of OMB.² The OMB website Cuccinello accessed for information (Applicant Appeals) stated: “No further contact is required while your appeal is being reviewed as you will receive a written response within ten (10) calendar days of the receipt of your written request.”

Cuccinello did not receive a written response from OMB within ten calendar days. On February 24, 2010, she filed a Step 1 grievance with DNREC.³ On April 19, 2010, Cuccinello appealed to Step 3 at OMB.

By e-mail dated April 20, 2010, OMB notified Cuccinello that “Your application has been determined not qualified for the following job requirement: Possession of a Bachelors degree or higher in Agricultural, Chemical, Civil, Environmental, or Mechanical Engineering OR Fundamentals of Engineering Certificate.”

In a Step Three Grievance Decision dated May 27, 2010, the hearing officer denied Cuccinello’s grievance. Cuccinello filed a timely appeal to the Board on June 16, 2010.

CONCLUSIONS OF LAW

Merit Rule 6.5 provides:

Notification of Rejection. Whenever an application is rejected, notice of such rejection with statement of

² Cuccinello based her appeal to OMB and her Step 1 grievance on Merit Rule 7.7. The Board believes that Merit Rule 6.5 is the applicable rule, not Rule 7.7, which provides for an appeal to the Director by applicants “who have been screened and ranked by training and experience.” Under either Merit Rule 6.5 or 7.7, the “decision of the Director shall be final.”

³ DNREC argued at the hearing that Cuccinello’s Step 1 grievance was untimely because she did not file it within fourteen days of the date of the grievance matter as required by Merit Rule 18.6. DNREC did not raise that argument in its motion to dismiss. It is not clear whether the parties waived the time limitation by proceeding through Step 3 without raising the issue. The Board does not have to decide this jurisdictional issue because it concludes as a matter of law that Cuccinello failed to state a claim of discrimination under Merit Rule 2.1.

reason shall be promptly provided to the applicant. Rejected applicants may appeal to the Director within ten (10) days of the rejection notice. The decision of the Director shall be final.

Merit Rule 2.1 provides:

Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation or other non-merit factors is prohibited.

The Board concludes as a matter of law that it does not have jurisdiction over Cuccinello's appeal regarding her qualifications for the position of Engineer III. She appealed DNREC's decision that she was not qualified to OMB. By e-mail dated April 20, 2010, OMB advised Cuccinello that she was not qualified. Under Merit Rule 6.5, the decision by the Director was final.

Cuccinello also claims gender discrimination in violation of Merit Rule 2.1. According to Cuccinello, she was the only female applicant for the Engineer III position and the only applicant removed from the qualified list after first being qualified.

"In a case of failure to promote . . . , the plaintiff must carry the initial burden of establishing a prima facie case of unlawful discrimination. Thus, the plaintiff must establish that he or she (1) belongs to a protected category; (2) applied for and was qualified for a job in an available position; (3) was rejected; (4) and, after the rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications for the position." *Bray v. Marriott Hotels*, 110 F.3d 986, 989-90 (3rd Cir. 1997).

Cuccinello did not establish a prima facie case of gender discrimination because she was not qualified for the position of Engineer III as determined by OMB Director. Cuccinello did not offer

any evidence that after her rejection DNREC continued to seek applications from persons of her qualifications for the position of Engineer III. Cuccinello did not offer any evidence that DNREC qualified other applicants who had a Masters degree in Environmental Studies like Cuccinello but not an engineering degree or certificate.

ORDER


It is this **31st** day of **January, 2011**, by a unanimous vote of 4-0, the Decision and Order of the Board to deny Cuccinello's appeal.



MARTHA K. AUSTIN, MERB Chairwoman



VICTORIA D. CAIRNS, MERB Member



JOHN F. SCHMUTZ, MERB Member



PAUL R. HOUCK, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **January 31,** 2011

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
OMB/HRM

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